Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1223

SUPER ATHLETICS CORPORATION
and DONALD E. PINCHOCK,
Petitioners,

v.

UNIVERSAL ATHLETIC SALES CO.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Counterstatement of the Case	3
Reasons for Denying the Writ	4
This Petition Is In Effect Simply A Second Attempt To Seek Review Of The Prior Appellate Ruling	4
Even The "Question Presented" Is The Same As That Presented In Petitioners' Earlier-Rejected Petition For Certiorari	6
In A Desperate Attempt To Invoke *DuPont v. United States,* Petitioners Have Misrepresented The Character Of The Court Of Appeals' Prior Ruling With Respect To Mr. Lyle's Testimony	6
Petitioners' Protestations About Being Unable To Anticipate The Defects In Mr. Lyle's Testimony Are Refuted By The Record	8
Petitioners Neither Offer A Showing Nor Even Contend That The Trial Court Abused Its Discretion In Denying The Motion For Partial New Trial; This Failure Is In Itself Fatal To The Instant Petition	9
Conclusion	11

TABLE OF CITATIONS

CASES

	PAGE
DuPont v. United States, 385 F.2d 780 (3rd Cir. 1967)	6, 7, 10
Graham v. John Deere, 383 U.S. 1 (1966)	9

OTHER AUTHORITIES CITED

Supreme Court Rule 19(b)	5

TABLE OF CONTENTS OF APPENDIX

Letter from Clerk of Supreme Court dated April 25, 1977	1b
Portions Of Petition For A Writ Of Certiorari At No. 76-1233	2b

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent respectfully prays that the petition for a writ of certiorari to review the judgment order of the United States Court of Appeals for the Third Circuit in this case be denied.

OPINIONS BELOW

The contents of petitioners' Appendix are incomplete with respect to the chronology of this case. These petitioners, joined by defendant below S. David Brodsky, sought a writ of certiorari from this Court at No. 76-1233 to review the earlier judgment of the Court of Appeals on the merits, entered November 19, 1976. The Clerk's notice of denial of that petition by this Court on April 25, 1977 does not appear in petitioners' Appendix but is included in the Appendix to this brief[1] (R.A. 1b). This Court's memorandum order of denial is reported at 97 S.Ct. 1681.

JURISDICTION

Petitioners' statement of jurisdiction is correct.

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1. Because of the need for an Appendix to this brief, we shall distinguish the Appendices by referring to petitioners' Appendix as "P.A. . . ." and to respondent's Appendix as "R.A. . . .".

COUNTERSTATEMENT OF THE CASE

The petition is utterly lacking in candor, not only in stating the case, but also in the omissions in that statement. The most glaring omission occurs in the failure to state that the issue which petitioners attempt to raise here was raised in their earlier petition.[2] This fact alone should be dispositive of the instant petition.

The petition lacks candor when it speaks of the "disqualification" by the Court of Appeals of petitioners' "expert" witness, Firman P. Lyle (Pet. 4). In truth, the Court of Appeals expressly held that Mr. Lyle's testimony was neither inadmissable nor incompetent (P.A. 15, fn 22) and said (P.A. 15-16):

> ". . . we cannot say that the district court committed error solely by not extirpating that [Mr. Lyle's] testimony."

The petitioners' inept use of a quotation from Shakespeare (Pet. 9) to suggest that the Court of Appeals somehow felt compelled to continually justify its treatment of Lyle's testimony is unwarranted. The Court of Appeals first expressed its concern on the question of Lyle's admitted lack of qualifications as an expert in pertinent technologies and concluded that he did not possess the requisite technical expertise for the subject matter involved (P.A. 11-13). The Third Circuit also examined the propriety, under the applicable provisions of the Code of Professional Responsibility, of Lyle's role as a witness in view of his being an attorney associated with the firm of defendants' trial counsel

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2. Pertinent portions of petitioners' earlier certiorari petition filed at No. 76-1233 are reproduced in the Appendix to this brief (R.A. 2b).

(P.A. 13-17). On both questions, the Court of Appeals concluded that the trial court properly admitted the testimony, but erred in according it controlling weight. To suggest that verbalizing these concerns constitutes "protest[ing] too much" is irresponsible.

Finally, the petition contends that the question of the validity of the patent in suit is "in limbo" (Pet. 10). This contention has no foundation in the Court of Appeals' opinion on the merits (P.A. 17-25), in the trial court's order denying defendants' motion for a partial new trial (P.A. 4-5), or in the Third Circuit's affirmance of that order (P.A. 1-3).

REASONS FOR DENYING THE WRIT

This Petition Is In Effect Simply A Second Attempt To Seek Review Of The Prior Appellate Ruling.

Both the trial court and the Court of Appeals denied petitioners' new trial motion solely on the grounds that further trial of the patent validity issue was precluded by the prior appellate ruling. In denying the motion, the trial court stated (P.A. 4):

> "The court has carefully examined the opinion of the Court of Appeals in this case filed November 19, 1976, together with amendment thereto and determines that the court did not provide for further trial with respect to the issues of patent validity and infringement. . . ."

The appellate judgment for which this review is sought merely confirmed the trial court's interpretation of the prior mandate (P.A. 2-3):

> "In this appeal from the denial of a motion for a partial new trial under Fed. R. Civ. P. Rule 59 appellants contend that the District Court misconstrued our mandate in Universal Athletic Sales Co. v. American Gym Etc., 546 F.2d 530 (3rd Cir. 1976) as precluding relitigation of the validity of two patent claims. We find no error."

Petitioners invoke Supreme Court Rule 19(b) as the sole grounds for seeking this review (Pet. 10). Yet petitioners cite no error in the interpretation of the prior appellate ruling, nor do they quarrel with the exercise by the Court of Appeals of its inherent power to interpret its own prior rulings.

The petition is thus devoid of any showing that the current interpretative ruling by the Court of Appeals in any way "so far departed from the accepted and usual course of judicial proceedings and from sound administration of justice as to call for an exercise of this Court's power of supervision" so as to justify review under this Rule.

Instead this petition is simply a renewal of the attack on the merits of the previous appellate decision that was the subject of the earlier-denied petition for certiorari (R.A. 1b).

Even The "Question Presented" Is The Same As That Presented In Petitioners' Earlier-Rejected Petition For Certiorari.

Except for cosmetic changes, the "Question Presented" in this petition is the same as the "Secondary Question Presented" in petitioners' earlier petition (R.A. 3b) for certiorari in this case. That earlier petition was denied by this Court (R.A. 1b) on the same substantive record as is before the Court now[3]. This Court's prior action should be dispositive of the instant petition.

In A Desperate Attempt To Invoke DuPont v. United States, Petitioners Have Misrepresented The Character Of The Court Of Appeals' Prior Ruling With Respect To Mr. Lyle's Testimony.

Petitioners contend that their motion for a partial new trial is controlled by the Third Circuit's decision in *DuPont v. United States,* 385 F.2d 780 (3rd Cir. 1967).[4] In its zealousness to come within that decision, petitioners flatly misrepresent the holding of the Court of Appeals with regard to Mr. Lyle's testimony. The petition variously states:

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3. Except of course for petitioners' "Motion for Partial New Trial" and the proceedings on it in the courts below; that motion, however, constitutes mere argument of counsel and adds nothing of substance to the record.

4. In *DuPont,* the trial court, after the trial had closed, held the testimony in question (which was admitted *without objection*) to be legally incompetent, yet denied plaintiffs' timely motion for a partial new trial. The Third Circuit reversed and remanded the case with instructions to grant the new trial motion so that plaintiffs would not be prejudiced by the post-trial determination of *inadmissibility.*

". . . on the *disqualification,** by the Circuit Court, of the testimony of Firman P. Lyle . . ." (Pet. 4)

and

"on the *discarding* of Lyle's testimony . . ." (Pet. 12)

and

"While in the DuPont case, supra, the District Court held the opinion evidence to be *inadmissible* after trial, whereas in the present case the Circuit Court did so also after trial . . ." (Pet. 15).

In truth, the Court of Appeals expressly held (P.A. 15):

". . . so Mr. Lyle's testimony is not incompetent."

and (P.A. 15-16):

". . . we cannot say that the district court committed error solely by not extirpating that [Mr. Lyle's] testimony."

Thus, the defect in Mr. Lyle's testimony, as repeatedly stated by the Court of Appeals, was that the trial court erroneously accorded it controlling weight in deciding the patent validity issue.

The decision in *DuPont,* therefore, is inapposite to the present case because here there was no post-trial determination that the testimony of Mr. Lyle was inadmissible or incompetent; the Third Circuit's treatment of the testimony went only to its weight. The *DuPont* decision itself makes a definite distinction between the weight of evidence based on the credibility of conflicting expert witnesses and the determination after trial that certain evidence was inadmissible:

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*Emphasis ours throughout unless otherwise noted.

"If the decision of the district court had been based upon a rejection of Patterson's credibility, the dismissal of the complaint would have been *unassailable,* for plaintiffs' case rested on his testimony." (385 F.2d at 783)

Petitioners' Protestations About Being Unable To Anticipate The Defects In Mr. Lyle's Testimony Are Refuted By The Record.

The petition harps on an alleged inability to have anticipated the objections at trial to Mr. Lyle's testimony. Pointing to other cases in which Mr. Lyle testified without objection is, of course, unavailing because such matters are immaterial and outside of this record. The fact is that petitioners, in light of respondent's objections based on his association with defendants' trial counsel, were admonished by the trial court prior to Lyle's testifying (P.A. 81-82):

"I think we will permit the witness to testify, but as to what effect this has upon his credibility, that will be up to the court whether this indicates some interest or bias on his part."

* * *

"But the weight to be given the testimony under these circumstances will be for the Trial [sic] of Fact."

In the face of this admonition, petitioners nevertheless elected to rely on his testimony and closed their case.[5] Their protestations now about "hardship", "in-

5. Mr. Lyle began testifying on October 31, 1974; respondent's objection to his testimony was interposed on that date (Tr. 370-82). At the close of that session, counsel for petitioners stated his intention to call another expert witness (Tr. 460). The trial court then adjourned the trial for more than one month. Upon resumption of the trial on December 11, 1974, petitioners called Lewis Riecke as an expert (Tr. 488) but did not elicit testimony from him on the prior art even though he was a contemporary designer of weight training machines, the art which the Court of Appeals found to be the pertinent art (P.A. 12) under the criteria of *Graham v. John Deere,* 383 U.S. 1 (1966).

justice" and "springing a surprise" are simply unsupported in fact and should not be countenanced.

Indeed neither the trial court nor the Court of Appeals sustained respondents' objections to Lyle's testimony on ethical grounds, and the controlling weight given his opinion testimony by the trial court was also discounted by the Court of Appeals on entirely different grounds involving his admitted lack of technical expertise in the pertinent arts.

Petitioners Neither Offer A Showing Nor Even Contend That The Trial Court Abused Its Discretion In Denying The Motion For Partial New Trial; This Failure Is In Itself Fatal To The Instant Petition.

Assuming that the prior appellate mandate did not preclude further trial on the validity issue, petitioners must still show that the trial court erred in denying their new trial motion and also that the Court of Appeals committed a gross abuse of justice in upholding that denial. Petitioners totally ignore the *sine qua non* for the relief sought from the Court of Appeals, namely, that an abuse of discretion was committed in the trial court's refusal to grant a new trial for the purpose of hearing some unidentified expert present unspecified testimony.

The *DuPont* case relied upon by petitioners establishes the limited criteria for appellate review in this case:

> "An application to open judgment and permit the taking of additional testimony with consequent amendment of findings of fact . . . *necessarily invokes judicial discretion.* The denial of relief therefore *must be upheld on appeal* unless there is a *clear showing* that there was *no reasonable basis* within the range of discretion for the action taken." (385 F.2d at 783)

Yet petitioners offer no showing whatsoever, and indeed do not even contend that the trial court committed an abuse of its discretion or that the Court of Appeals departed from accepted judicial standards in upholding the trial court. Rather, petitioners would urge this Court to usurp the discretionary power imposed in the trial court by exercising its own discretion in ordering a new trial.

Obviously, the trial court's refusal to order a new trial, merely to hear a rehash of Mr. Lyle's testimony on the prior art from a less biased or more qualified expert, was within its discretion and was affirmed by the Court of Appeals. Indeed this denial finds specific authority in the prior opinion and mandate of the appellate court which stated (P.A. 20, fn 39):

> "We believe that the trial judge should have required the testimony of one skilled in the design of weight-lifting machines before invalidating the Zinkin claims. ***Even if defendants had produced such an expert, it still is questionable whether the factual proof submitted was sufficient to void the patent.***"

CONCLUSION

For the foregoing reasons, this Court should deny a writ of certiorari.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

April 25, 1977

Robert D. Yeager, Esq.
350 Porter Building
Pittsburgh, PA 15219

RE: Super Athletics Corporation, S. David Brodsky, and Donald E. Pinchock v. Universal Athletic Sales Company, et al. No. 76-1233

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case.

Very truly yours,
MICHAEL RODAK, JR., Clerk
By

/s/ HELEN TAYLOR
Assistant Clerk

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-

SUPER ATHLETICS CORPORATION,
S. DAVID BRODSKY & DONALD E. PINCHOCK,
Petitioners

v.

UNIVERSAL ATHLETIC SALES COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case.

* * * * * * *

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered November 19, 1976. Petitioners' petition to the Court of Appeals for rehearing in banc was denied on December 9, 1976 (App. 21). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

* * * * * * *

SECONDARY QUESTION PRESENTED

The Appeals Court ruled that the trial court was without error in its holding that the testimony of an expert witness, Lyle, was admissible but that the trial court erred in the *weight* which it gave to Lyle's testimony. Was the Appeals Court in error in its ruling that the trial court errored in the weight which it gave to Lyle's testimony?

STATEMENT OF THE CASE

* * * * * * *

The Court of Appeals' reversal of the trial court was based on its objection to the *weight* given by the trial court to the view of Petitioners' expert, Firman P. Lyle (App. 6, 8, 11, 12, 20). Lyle had served for 7 years as an examiner in the United States Patent Office and for 35 years as a patent attorney for Westinghouse (App. 8). He handled patent matters relating to turbines, motors and generators (App. 8). The Appeals Court questioned Lyle's competence (App. 8) and said that Lyle might be biased because he was associated with counsel for Petitioners (App. 11, 12). The Appeals Court ruled that Lyle's testimony was admissible and that it cannot find that the trial court "abused its discretion in recognizing him as an expert" (App. 8). It held, however, that the trial court erred in giving Lyle's testimony controlling weight (App. 6, 8).*

*Since the five witnesses testified in person before the trial judge, he alone had an opportunity to observe their demeanor and to assess their credibility and he, and not the Appeals Court, was competent to determine what weight to give to the testimony of each.

* * * * * * *

REASON FOR GRANTING THE WRIT

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II. WEIGHT GIVEN TO LYLE'S TESTIMONY PREROGATIVE OF TRIAL COURT — RULE 52 FRCP.

The Appeals Court held that the trial court did not err in admitting Lyle's testimony but erred in giving it weight. Once Lyle's testimony was admitted, it was the trial judge's prerogative to determine Lyle's credibility. This judge alone had the opportunity to act as a lie detector and observe the reaction of Lyle and the other experts under direct and cross-examination.

The action of the Appeals Court was in total disregard of Rule 52 FRCP which reads in part:

> Findings of fact shall not be set aside unless clearly erronious, and *due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses* (emphasis added)

That only an expert witness with Lyle's background should be suspected of bias (App. 4) is a fiction.* Each litigant in a case which demands expert testimony explores the view on the case of prospective expert witnesses and employs only those that support its findings of the case. In patent cases, courts are usually faced with the spectacle of experts on opposite sides of the case, testifying categorically contrary to each other. These contradicting witnesses are under the fiction regarded as unbiased. There is no logical basis for the

*Exhibit DX8 (App. 51) shows that Respondent's expert, Richard Berger, was an employee of Respondent.

Appeals Court singling out Lyle for this stigma, particularly as it did not witness his testimony. In any event, Lyle's objectivity was for the trial judge who had the opportunity to observe him. The Appeals Court should have adhered to the trial court's evaluation of Lyle's testimony as required by Rule 52. Once it did so the trial court would have been affirmed.

* * * * * * *

Respectfully submitted,

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